IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/12/2003

CORAM

THE HONOURABLE MR. JUSTICE A. PACKIARAJ

Crl.R.C.No.1654 of 2001

Dhanam ... Petitioner

-Vs-

1.A.Nallathambi

2.State represented by
Inspector of Police,
Puthukadai Police Station,
Kanyakumari District
(Cr.No.7 of 1996) ..... Respondents

Revision filed against the judgment made in S.C.No.20 of 1997 on the file of the Assistant Sessions Judge, Kuzhithurai.

!For petitioner : Mr.R.N.Amarnath

^For respondent : Mr.P.Selvaraj for 1st respondent
Mr.J.Karuppaiah for Public Prosecutor
for 2nd respondent

:O R D E R

A decision to save the accused has been arrived by the investigating officer, Additional Public Prosecutor and the Presiding Officer, even before the commencement of the trial appears to be the fate of this case. A male teacher by name A.Nallathambi, aged about 50 years at the time of commission of rape, much less attempt to rape against a 10 year old student, has been acquitted by the Assistant Sessions Judge, Kuzhithurai, disbelieving the evidence of the victim girl on flimsy grounds and as if to add fuel to fire, the Assistant Sessions Judge, Thiru.R.Paranjothi has directed prosecution to be initiated against the victim girl for giving false evidence.

2. Though I am fully conscious of the powers of the High Court in dealing with the revision against acquittal by a private party in a case instituted on a police report, that the same should not be allowed unless there is a glaring illegality or grave miscarriage of justice, or material

evidence having been overlooked, I am of the view that this is one classic case where it certainly amounts to grave miscarriage of justice, since the reasonings given by the court below are contrary to facts and hence, it has necessitated me to go into the facts in detail.

3.The brief facts of the prosecution case is as follows:-

"a)P.W.1 Danam, a 11 year old girl went to school on 22.03.1990. During the classes, the Maths Teacher, namely the accused, called her and told her that she has to come to his home for tuition as usual. Hence, she went to the house of the accused. He took classes for some time. At that time, P.W.2, Sheeba, had also come there. The accused gave some Maths problems to be solved. He then went to a separate room and from there, he called P.W.1 inside. When she went inside the other room, he asked the girl whether she was wearing undergarments. When P.W.1 replied in the affirmative, he asked her to remove the same. P.W.1 refused to do so. However, the accused caught hold of her and forcibly removed her undergarments. Then he made her sit on his lap with both legs around his hips and then committed rape on her.
b)P.W.1 started bleeding and the blood had oozed on her dress. Unable to bear the pain P.W.1 shouted but the accused put a piece of cloth in her mouth and went on with his work.
c)After the commission of rape, he asked P.W.1 to put her undergarments and asked her whether she liked it, for which P.W.1 replied in the negative. P.W.1 said that if her parents knew about the incident, they would kill her. Thereafter, the accused kissed her cheeks several times and sent her home by giving some flowers which grew in his garden and threatened her that she should not inform anybody as to what happened and if she did, she will be torn to pieces. Then she left the place. But by that time, P.W.2, Sheeba had left.
d)As soon as she came back to her house, P.W.1 informed the matter to P.W.4 her mother. P.W.1's father was not in station that day and he came only on the night of 23.03.1996 and the matter was reported to him. On 24.03.1996, P.W.1's parents went to the house of P.W.1's paternal uncle. He accompanied them to the police station and gave a report. They also took the blood stained clothes and handed them over to the police.
e)P.W.1 gave a statement to the Inspector of Police, Pudukadai Police Station, wherein P.W.1 has stated the above mentioned details, except the fact that she was made to sit on the lap of the accused with her two legs around his hips. Therefore, the Investigating Officer has registered the crime only under section 354 IPC i.e. outraging the modesty and took up investigation, and filed charge sheet against the accused for offence under section 354 IPC.
f)However, it is seen that though the First Information Report has been registered under 354 IPC, subsequent statement recorded from Danam clearly establishes the commission of rape.
g)P.W.1 was sent for medical examination and P.W.7, Doctor who examined her on 24.03.1990 found that there were no injuries on her. The Hymen was intact and she has given a certificate that there is no indication that P.W.1 had cohabitation with a male. Ex.P-5 is the said certificate. But it is surprising that the Doctor who has given evidence so, has in Ex.P-5 stated "No definite opinion can be given regarding rape." It is strange as to how the public Prosecutor has not elicited any explanation from her regarding

this or the presiding officer taken note of it.
h)During the course of the investigation, P.W.1 has in detail mentioned the above facts and in spite of that, the Investigating Officer has filed the charge sheet only under section 354 IPC. Therefore, a petition was filed on behalf of the prosecution witnesses before this court in Crl.M.P.No.15414 of 1990 and this court by order dated 05.01.1994 had directed the court below to alter the charge to one under section 376 IPC. In pursuance of the same, charge under section 354 IPC was altered to 376 IPC and the trial proceeded."

4.P.W.2, Sheeba said that by about 4 clock in the evening, P.W.1 Danam came to her house and called her for the tuition. Thereafter, both of them went together for tuition and she found the wife and children of the accused to be present in the house. Since it was about to rain, tuition was over soon and they returned home together. After a few days, she was examined by the Police.

5.P.W.3 is the father of the victim and according to him, he came to know about the incident on the night of 23.03.1990 and immediately thereon, he went to his brother's house and from there proceeded to the police station along with P.W.1, preferred a statement and counter signed the first information report.

6.P.W.4 is the mother of P.W.1 and she has narrated about the incident as revealed by P.W.1. She was waiting for her husband to return and on his return, informed the matter to him and thereafter, went to the police station and gave a report.

7.P.W.5, brother of P.W.3, is also another witness who accompanied the other witnesses to the police station and gave a report. P.W.7 is the Doctor who examined P.W.1 and she has stated that there was no evidence of rape having been committed against her. However, the certificate issued by her would disclose "No definite opinion could be given regarding rape." The other witnesses are formal witnesses.

8.The learned Judge surprisingly has commented upon the orders passed by the High court, which directed the lower court to alter the charge to offence under section 376 IPC from that of section 354 IPC. The learned Judge has said that there is absolutely no material for charging under 376 IPC and that the statements of none of the witnesses would disclose that an offence under section 376 IPC is made out and it has been represented to the High court as if the records would disclose an offence under section 376 IPC has in fact been made. The learned Judge has also observed that a conspiracy has been hatched to get that order.

9.I am afraid, it is too much for an Assistant Sessions Judge to comment upon the orders passed by the High court. High Court does not pass orders just hearing the petitioner's oral arguments. We see the records and after being fully satisfied and hearing the other side, pass an order. In the present petition, before the High Court, the statement of the victim P.W.1 was there, which clearly indicates the commission of rape, much less an attempt to

rape. Therefore, the criticism made by the Assistant Sessions Judge is unwarranted.

10.Now coming back to the findings, the learned Judge to begin with, before analysing the evidence of P.W.1 has commented upon the evidence of P.W.3, P.W.4 and P.W.5, father, mother and paternal uncle of P.W.1 respectively, who accompanied P.W.1 to the police station and gave a report. All of them admit that the report which was written by the police officer was not read over to